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No. 75-1038

In the Supreme Court of the United States

OCTOBER TERM, 1975

DIAMOND NATIONAL CORPORATION, APPELLANT

v.

STATE BOARD OF EQUALIZATION

CROCKER-CITIZENS NATIONAL BANK, APPELLANT

v.

STATE BOARD OF EQUALIZATION

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

These consolidated cases present the question whether the legal incidence of the California sales tax is on the purchaser of personal property so as to render unconstitutional its imposition upon purchases by a federal instrumentality such as a national bank. The issue is currently awaiting oral argument in the United States Court of Appeals for the Ninth Circuit in a suit brought by the United States challenging and imposition of the California sales tax with respect to leases of tangible personal property to

the United States and seeking the recovery of more than $12 million in taxes (*United States* v. *State Board of Equalization*, C.A. 9, No. 74-3360). In the federal suit, the United States District Court for the Central District of California held that the California sales tax was unconstitutional as applied with respect to leases to the United States, because the legal incidence of the tax fell on the federal government as lessee (J.S. App. C 45-49). In these cases, the California Court of Appeal concluded that the legal incidence of the California sales tax was on the vendor and thereby upheld the imposition of the tax on sales to national banks. The resolution of the federal immunity question here will substantially affect the rights of the United States and govern the disposition of its pending suit involving the same issues.

QUESTION PRESENTED

Whether the California sales tax, which provides that the tax "shall be collected by the retailer from the consumer in so far as it can be done," is unconstitutional as applied to sales to a national bank.

STATEMENT

Appellants brought these consolidated suits for refund of California and local sales taxes in the Superior Court of California.[1] The suits challenged the constitutionality, under federal immunity principles, of the application of the California sales tax to sales to

[1]Appellant Diamond National Corporation sold printed forms and other items of tangible personal property to appellant Crocker-Citizens National Bank. During the period at issue, Crocker paid sums over to Diamond representing "sales tax reimbursement" which Diamond paid over to the state. Both Crocker and Diamond filed claims for refund which were disallowed. Diamond has agreed that any refund returned to it would be refunded to Crocker (J.S. App. A 24-25).

national banks. The superior court held that the legal incidence of the California sales tax is on the purchaser, so that purchases by Crocker-Citizens National Bank, a national bank, are exempt from the tax under federal immunity principles (J.S. App. B 35-39). However, the California Court of Appeal reversed. It held that the legal incidence of the tax was on the retailers. Although the California sales tax statute provides that the tax "shall be collected by the retailer from the consumer" the court distinguished this Court's decision in *Agricultural Bank* v. *Tax Commission*, 392 U.S. 339, on the ground that California, unlike the Massachusetts tax involved in that case, had no "mandatory requirement" that its sales taxes be passed on to the purchaser (J.S. App. A 23-33). The California Supreme Court denied appellant's petition for hearing (J.S. App. E 55).

DISCUSSION

This case presents a substantial constitutional question that should be resolved by this Court.

1. In *Agricultural Bank* v. *Tax Commission, supra*, 392 U.S. 339, this Court held that the Massachusetts sales tax could not constitutionally be imposed on purchases by a national bank, because a sales tax is not among the state taxes permitted by 12 U.S.C. 548 to be levied on national banks, and because the legal incidence of the tax fell upon the purchaser. The test formulated by the Court in *Agricultural Bank* and reaffirmed more recently in *United States* v. *Mississippi Tax Commission*, 421 U.S. 599, 607-608, is that "a sales tax which by its terms must be passed on to the purchaser imposes the legal incidence of the tax upon the purchaser" (392 U.S. at 347).

This case presents the identical question in the context of the California sales tax levied upon the purchases

of a national bank. The pertinent California sales tax provisions state that the tax "shall be collected by the retailer from the consumer in so far as it can be done" and that it is unlawful for any retailer to advertise or hold out to the public or to any customer that the tax will be absorbed by the retailer or that it will not be added to the selling price of the property sold.[2] These provisions are not in substance distinguishable from the Massachusetts sales tax that the Court in *Agricultural Bank* held unconstitutional as applied to national banks.[3] Under the *Agricultural Bank* test, there can be no doubt that the California legislature intended that this sales tax be passed on to the purchaser. As the Court emphasized in *Agricultural Bank*, "For our purposes, at least, that intent is controlling" (392 U.S. at 348). Thus, just as a national bank is immune from the Massachusetts sales tax, it is similarly protected from the California sales tax at issue in this case. Accord: *United States* v. *Mississippi Tax Commission*, 421 U.S. 599; *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110; and *United States* v. *Nevada Tax Commission*, 291 F. Supp. 530 (D. Nev.), affirmed, 439 F.2d 435 (C.A. 9).

2. Contrary to the decision below (J.S. App. A 29), this Court's decision in *Gurley* v. *Rhoden*, 421 U.S. 200,

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[2]Revenue and Taxation Code, West's Ann. Calif. Codes §§ 6052 and 6053 (1970 ed.).

[3]Significantly, in *Agricultural Bank, supra*, the Massachusetts Supreme Judicial Court noted (229 N.E.2d 245, 250-251) that the Massachusetts statutes did not require the vendor to collect the tax from the consumer, but rather made such collection optional. Thus, the fact that Section 6052 of the California Revenue and Taxation Code provides that the tax "shall be collected by the retailer from the consumer *in so far as it can be done*" (emphasis supplied) does not, as the decision below erroneously concluded (J.S. App. A 28), distinguish it from the Massachusetts statute.

is not germane to the resolution of the federal tax immunity question here. In *Gurley*, the question was whether, under Mississippi law, the legal incidence of the Mississippi gasoline tax fell on the distributor-vendor or on the purchaser, neither of whom was a federal entity or agency. In resolving that question, the Court gave great weight to the holdings of the Mississippi Supreme Court with respect to the legal incidence of its excise tax. But where, as here, the question is whether the tax affects federal immunity, the Court has repeatedly held that "it is clear that for this limited purpose we are not bound by the state court's characterization of the tax." *Agricultural Bank* v. *Tax Commission, supra*, 392 U.S. at 347. Cf. *Kern-Limerick, Inc.* v. *Scurlock, supra*, 347 U.S. at 121. Thus, the characterizations of the California sales tax by the California Supreme Court, upon which the decision below relied (J.S. App. A 27-28), are not controlling with respect to the immunity question. At all events, the California decisions[4] invoked by the Court of Appeal for the proposition that the legal incidence of the tax fell on the vendor were decided on the theory that the vendor was legally obligated to pay the tax—a rationale expressly rejected by this Court in *Agricultural Bank*.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[4]*Western Lithograph Co.* v. *State Board of Equalization*, 11 Cal. 2d 156, 78 P.2d 731; *De Aryan* v. *Akers*, 12 Cal. 2d 781, 87 P.2d 695. See also *Ainsworth* v. *Bryant*, 34 Cal. 2d 465, 211 P.2d 364.